[ORIGINATING CIVIL JURISDICTION]

CUSSEN, J.

October 8, 1938.

ABDUL MAJEED

v.

OFFICIAL ADMINISTRATOR, F.M.S.

(SELANGOR CIVIL SUIT No. 33 of 1937)

Limitation Enactment (Cap. 18) SS. 39, 16 (i)—lands acquired for a partnership and registered in name of a partner—death of registered proprietor—Suit by legal representative of one partner against that of registered proprietor—starting point of period of limitation—laches and acquiescence.

Certain lands, acquired as part of the assets of a partnership between P.A. and V.K. were registered in the name of "V.K." P.A. died in 1915 and the death had the effect of dissolving the partnership. The business was carried on as before by V.K. The share of P.A. in the partnership was transferred into the name of his infant son who was only 3 years old at the death of P.A. V.K. died in 1918. Letters of Administration were ultimately granted to the Official Administrator, the defendant. It was not until 1936 when she was served with proceedings in Raub Administration Suit No. 2 of 1929, that the widow of P.A. through an attorney obtained representation to the estate of P.A. The attorney as Administrator of P.A's. estate filed a Suit against the Official Administrator for inter alia (1) a declaration that P.A. held a half share in the partnership firm and (2) a declaration that the immoveable properties were held in trust for the partners.

Held, that, in so far as the suit was one against the defendant as a partner in the partnership between P.A. and V.K. it could only be an action for an account and share of the profits of a dissolved partnership, the dissolution having been effected by the death of P.A. and could fall under article 86 of the Schedule to the Limitation Enactment (Cap. 18) but that as the cause of action rested on the death of P.A. the Suit was one which he could not have brought in his lifetime and therefore section 16 (i) of the Enactment had no application.

Held also, that V.K. having been registered as the owner of the lands in the position of an express trustee, the suit was not barred by limitation.

Held further, that the plaintiff was not debarred by laches and acquiescence for prosecuting the claim.

TRIAL OF SUIT.

W. G. W. Hastings (*M. N. Cumarasami* with him) for the plaintiff.

R. Ramani for the defendant.

Cussen, J. In this suit the Plaintiff is the Administrator of the Estate of one P. A. Abdullasa, deceased, and the Defendant is the Official Administrator, Federated Malay States, as Administrator of the Estate of one V. K. Abdullasa, deceased.

From about the year 1906 P. A. Abdullasa and V. K. Abdullasa carried on a business in partnership under the name of A. K. Abdullasa in the District of Bentong in Pahang. They held equal shares in this partnership.

I will hereafter refer to these two persons and the partnership as "P.A.", "V.K.", and "A.K." respectively.

The business was that of sundry shops at Bentong Town and Karak village.

"P.A." died intestate in India on 10th August 1915.

Before that date certain lands were acquired for the partnership, whether by alienation or by purchase does not appear from the evidence, and is in any case immaterial. The lands were acquired as and became part of the assets of the partnership.

Under the Land Enactment and the Registration of Titles Enactment land could only be held by an individual or some legal person such as a company. A partnership could not, therefore, be the registered owner of lands.

Accordingly, these lands were registered in the Land Registers as being held by "A. K. Abdullasa. That means that the person to whom these lands were alienated or transferred represented himself by the name of "A. K. Abdullasa".

There is no evidence given, so far as I can see, to show whether the person who so represented himself was "P.A." or "V.K.", but it appears from the pleadings and the conduct and acts of the parties to be agreed and accepted that it was "V.K." who did so.

"V.K." under the name or alias of "A. K. Abdullasa" was the registered proprietor and the legal owner of these lands, but it is quite clear that he held these lands in trust for the partnership consisting of himself and "P.A."

The death of "P.A." in 1915 had the effect of dissolving the partnership.

But the business was carried on as before by "V.K.", and it appears from the evidence given that the share of "P.A." was transferred into the name of his minor son, P. A. Pakir Mohamed. This son, who gave evidence, is now 26 years old so that at the time of the death of "P.A." he was only three years old.

"V.K." died on 20th October 1918.

From 1915 up to 31st August 1917 it appears from the Books produced that the only partners in the business of "A. K. Abdullasa" were "V.K." and P. A. Pakir Mohamed. But between 1917 and the death of "V.K." it appears that other persons were taken into the partnership, two of whom were employees who were given "working shares" and capital shares. So that at the death of "V.K." according to the books the partners in "A. K. Abdullasa" were six in number. Of course this partnership though bearing the same name was legally a different partnership from that which was dissolved by the death of "P.A." in 1915.

In December 1918 one A. Rahimsah who was the uncle of "V.K." obtained Letters of Administration to the Estate of "A. K. Abdullasa". It was of course necessary to take out the Letters of Administration in that name as that was the name used by "V.K." when he became the registered owner of the lands.

A. Rahimsah then arranged for some form of "arbitration" which resulted in a scheme for the distribution of the assets of the business of "A. K. Abdullasa" including the lands referred to.

This attempt at distribution was however abortive; it was never carried out, at any rate as regards the lands.

From 1918 the lands were managed by the Administrator—Rahimsah—assisted until 1920 and 1922 by Hassan Mohamed and Abdul Gani who as "partners" in the business as constituted at the death of "V.K." in 1918 were given certain distribution-shares in the arbitration scheme drawn up in 1919.

These two men died in 1920 and 1922 respectively and from then on until 1930-31, when the administration was given to the Official Administrator, the lands were looked after and managed by Rahimsah.

In 1928 or early 1929 the widow of "V.K." was apparently dissatisfied with the state of things and, through an attorney, applied in Raub Administration Suit No. 2 of 1929 to have the administration taken from Rahimsah and given to the Official Administrator.

The Court made the order and also directed the Registrar to hold certain inquiries—set out in the order. This order is Exhibit D1 dated 28th January 1931.

The certificate of the Registrar, dated the 4th September 1931, is Exhibit D.

Exhibits E and E1 contain the evidence oral and documentary (so far as relevant at present) given at the inquiry before the Registrar.

I understand that the Official Administrator has taken over the immovable properties, but that he has not yet succeeded in obtaining satisfactory accounts from the former Administrator.

The next thing to happen is that some time in 1936 (so it would appear from the affidavit of the Plaintiff) a summons to confirm the certificate of the Registrar of 4th September 1931 was served on the widow of "P.A." She thereupon sent the Plaintiff to this country as her attorney. He as such has now obtained Letters of Administration to the Estate of "P.A." deceased and brings the present suit against the Estate of "V.K.""

The prayers of the plaint are:—

"(a) a declaration that the said "P.A." held a half share in the said partnership firm of "A. K. Abdullasa";

(b) a declaration that the said immovable properties are held in trust for the partners in the said partnership (being the lands registered in the name of "A. K. Abdullasa");

(c) for an order appointing the Defendant receiver of the property of the said firm for the purpose of realising the assets and distributing the proceeds between the estates of the said two partners;

(d) for an order that the Defendant do dispose of the immovable properties held in trust for the partners of the said firm of "A. K. Abdullasa" and do pay out the proceeds to the cestui qui trust;

(e) further and other relief

(f) costs.

The first question for determination is whether or not this suit is barred by limitation.

Since "P.A." died in 1915 it is quite evident that this suit would be so barred under the general law as stated in section 3 of the Limitation Enactment (Cap. 18) unless the case falls within some one or more of the exceptions in sections 4 to 24 of the Enactment.

The Plaintiff relies upon two of these provisions, i.e. section 9 and section 16(i).

I will consider first the application of section 16(i).

Section 16(i) reads as follows:—

> "16(i) When a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application".

This is identical with section 17(i) of the Indian Limitation Act and also with section 16(i) of the Straits Settlements Limitation Ordinance.

The rule of English law is stated as follows in Halsbury (Hailsham), Vol. 20, p.778:—

> "If a person, to whom a cause of action would have accrued had he been living dies intestate before the time when the cause of action would have accrued, if he were living, the statute does not begin to run until administration is taken out....."

A number of cases were cited by counsel—on the English law, on the Indian Act and on the Colony Ordinance; but before considering these I will first state what my view is, based upon reading the words of the section, and I hope to show that examination of the cases confirms this view or at any rate does not come into conflict therewith.

The difficulty, where there is such, in the application of section 16(i) to any particular case does not lie in and is not to be solved only by the question as to whether the cause of action arises on or after death, on which there has been much argument before me, but it also lies in the simple question—Could the deceased, if alive, have brought the suit?

If the answer is yes, the section applies; if the answer is no, it does not apply.

It is evident that if the cause of action depends upon the fact of the death then it is one which could never have accrued to the deceased in his lifetime. Such would be the case if the dissolution of a partnership by death is the cause or an essential part of the cause of action.

You must assume the person to be living and then, in the light of that assumption, ask the question does the suit lie?

The words of section 16(i) are clear and free from ambiguity and capable of only one interpretation. That interpretation, as I have explained it, must therefore be given effect to when considering the application of the section to any set of facts.

I will now consider the cases cited.

First there is the case of *Murray v. The East Indies Co.*, 106 E.R. 1167. But this was an action upon Bills of Exchange and so in this case if the deceased were alive he could have instituted the action.

Next there is the case of *Lawless v. The Calcutta Landing and Shipping Co., Ltd.*, 7 Calc. 627. The relevant paragraph in the judgment reads:—

> "Now in the case of a person employed as manager the right of the employer is to have an account rendered by the person employed whenever he is called on to do so under reasonable circumstances. There is nothing to show that Captain Lawless was ever called on to account for those moneys or to account generally. He died on the 29th August 1877, and his agency terminated. I think, by his death, the Company acquired a fresh right to have an account rendered by his representative, and that right is recognized by art. 89.....The case, therefore, is protected by s.17 of the Limitation Act".

But in this case if the deceased were living there would be the same right to institute a suit against him for an account so it answers the test:—assume the deceased to be alive.

The case of *Rivett-Carnac v. Goculdas*, 20 Bom. 15 is important as it went to the Privy Council (26 I.A. 32 at p.36).

In this case, on the death of Hemabai, her heir Kissondas had a right to bring the suit, as, not being affected by the Indian Succession Act, an heir does not require to obtain Letters of Administration to give him the right to bring an action. But the heir Kissondas was an infant at the death of Hemabai and still an infant at the date of the suit, so his right was protected by section 6 of the Limitation Act by reason of his minority; the decision that the suit was not barred by Limitation was made under section 6 and not under section 17. It is clear that, at any rate,

that was the ground on which the Privy Council upheld the decision. At page 36 the judgment proceeds:—

> "Then they held that the suit was not barred by limitation. They considered—and their Lordships agree in their view—that on the materials before the Court it must be taken that the Administrator-General is suing on behalf of the infant heir".

That case was in 1898.

In *Meyappa Chetty v. Supramanian Chetty,* 43 I.A. 113—a Singapore case in 1916—their Lordships of the Judicial Committee carefully refrain from deciding whether section 17(i), (now section 16(ii)), applied to the suit in question, which was a suit by the administrator asking for a declaration that the partnership between the testator and the Defendant had been dissolved by the testator's death and for the usual partnership accounts.

The test for the application of section 17(i) is clearly indicated in their Lordships words:—

> "Assuming, but without deciding, that this is to be deemed to be a suit which the testator would, if he were living, have a right to institute....."

Finally there is the case of *Chan Kit San v. Ho Fung Han,* 1902 A.C. 257—a Hongkong case.

At page 260 the judgment contains the following words:—

> "According to the well-established rule in English law, the Statute runs against an intestate's estate from the date of the grant of Letters of Administration only".

As a statement of the rule of English law this seems to me not to contain all that is set out in the definition from Halsbury already quoted. It does not contain the qualification that the cause of action must be one which would have accrued to the deceased had he been living.

The case in question was a suit for an account of partnership transactions between the deceased and the appellants, but the facts are not sufficiently set out—it appears to me—to determine whether the suit was one which the deceased could have brought if alive. Nor, as far as I have been able to ascertain, is there in the Hongkong Ordinance any provision similar to section 16 of our Limitation Enactment.

Now to apply section 16(i) as I have interpreted it to the present suit, it is evident that, in so far, if at all, as this suit is one against the Defendant as a partner in the partnership between "P.A." and "V.K.", it could only be an action for an account and share of the profits of a dissolved partnership, the dissolution having been effected by the death of "P.A.", and would fall under article 86 of the Schedule to the Enactment. But in such a case, as the cause of action rests on the death of "P.A.", it is clearly a suit which he could not have brought in his lifetime.

I will now consider the application of section 9 of the Limitation Enactment to this suit.

Section 9 reads:—

> "9. Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time".

The question then is—Was "V.K." under the alias of "A.K." when registered as the owner of these lands in the position of an express trustee for the partnership?

In my opinion he was.

When some individual person had to be registered as the owner of the lands acquired by the partnership, a third person, not one of the partners, but a stranger —a Mr. X—might equally well have been chosen and the lands registered in his name. In such a case there can be no question that "X" would be an express Trustee.

I do not see that it makes any difference that one of the partners was chosen—he is in exactly the same position.

That being so viewing this suit as one against the Defendant, not as a partner, but as an express Trustee of these lands (and the plaint as amended has been framed in this form) it comes under section 9 of the Enactment and is not barred by Limitation.

The Defendant also pleads that the Plaintiff's claim is barred by laches and acquiescence.

It is said that the widow of "P.A.", who is the administratrix—the Plaintiff—, did nothing from the death of "P.A." in 1915 until 1937—a period of 22 years, though she must have had adequate knowledge of the claims of the Estate of "P.A". But it must be remembered firstly that all the persons involved in the affairs of this partnership and this business (most of them are now dead) were all related—brothers-in-law, sisters, uncles, nephews, nieces; and the widow of "P.A.", like the widow of "V.K.",—women living in India—was obviously dependent on the good faith and conduct of the elder male, i.e. Rahimsah, for the conduct of affairs in this country. And so she gave him a Power of Attorney, relying upon him to do all that was necessary. He, in fact, on the death of "V.K." did make a real effort to settle these matters but, as already stated, his effort failed.

In all the circumstances I cannot see in the conduct of the widow—the Plaintiff—any such wilful neglect or laches, or any such acquiescence in, or even knowledge of, the things that happened after the death of her husband and after that of "V.K." relative to the business and properties of the partnerships as would disentitle her to relief from the Court.

Order accordingly.